

NTSB Order No. EA-4523

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 3rd day of February, 1997

Respondent .

Administrator's order suspending respondent's private pilot certificate for 90 days, upon again finding that the Administrator had not met his burden of proving that respondent had violated 14 C.F.R. 91.119(b).² We deny the Administrator's appeal.

The Administrator's complaint and order charged that, on April 10, 1994, respondent, as pilot-in-command, operated an aircraft over a congested area of Horace, ND, in violation of the cited regulation. In support of his allegation, the Administrator introduced the eyewitness testimony of a husband and wife, Mr. and Mrs. Flaten, over whose house respondent had allegedly flown at an altitude of approximately 100 feet. Both testified that the aircraft's registration number was N9178U, which respondent acknowledged was the number of his aircraft. Both testified that the low passes occurred at between 7:25 and 7:35 P.M. Neither identified the pilot.

The owner of the fixed base operation (FBO) where respondent kept his aircraft, who had known respondent for years and did the maintenance on the aircraft, testified that respondent's aircraft had been flown about that time, but that he had not seen

(...continued)

judge's initial decision. We remanded to him to issue a more thorough decision explaining his conclusion in light of all the evidence.

²Section 91.119(b) provides as pertinent that, over any congested area of a city, town, or settlement, or over any open air assembly of persons, and except when taking off or landing, a person may not operate an aircraft below an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet
(continued...)

respondent himself, and did not know if respondent was in the aircraft.³

Respondent, who has represented himself in this proceeding, testified that he had flown the aircraft that day, but had not departed the airport until approximately 7:55 or 8:00 P.M., that he had overflown Horace, but not at the altitude alleged, and that he had also seen an aircraft similar to his earlier that day, and between 7 and 7:30.⁴ Respondent testified that the low flight reported could not have been his, because he was at home at the time. He introduced the testimony of three of his neighbors that they saw him in his front yard at the critical time. Respondent's passenger in the aircraft generally confirmed respondent's account.⁵

(...continued)
of the aircraft.

³There was a discrepancy between the report taken by the FAA from a contemporaneous telephone conversation with this gentleman, and his testimony at the hearing. Although he stated that he was sure what he told the FAA at the time was accurate (*i.e.*, that he had seen respondent preflighting the aircraft between 7 and 7:30), at the hearing he stated that he had never actually seen respondent, only the aircraft take off. Tr. at 64. The law judge credited this testimony. Decision on Remand, at 14.

⁴As part of his argument that the law judge's decision does not reflect the weight of the evidence, the Administrator notes that, in his answer to the complaint and in answers to discovery, respondent admitted the allegations. It is clear from the record as now developed, however, that respondent's answers were meant to admit the facts to which he testified (*i.e.*, that he did pilot the aircraft that date, and in the same area). And, as respondent is representing himself, he is, we think, entitled to the benefit of the doubt on this point, as the law judge apparently also concluded.

⁵Respondent's wife also testified that she had seen a low flying aircraft with coloring similar to theirs at sometime after 7
(continued...)

Just as in his first decision, the law judge has again concluded that the Administrator has not met his burden of proof and, while we would still prefer more decisive and detailed findings of fact and credibility determinations given the evidentiary inconsistencies, we can see no purpose in again asking the law judge to review the matter. It is clear that the testimony of the three neighbors as well as respondent's passenger influenced the law judge considerably. It is this evidence, along with the FBO operator's testimony, that led the law judge to conclude that the Administrator had not proven by a preponderance of the evidence that it was respondent piloting the aircraft.

The Administrator argues that the only reasonable explanation was that there was only one flight that day in N9178U, that it was piloted by respondent, and that it was that flight that was observed by the Flatens. However, there are three possible explanations: first, that the Flatens incorrectly identified respondent's aircraft; second, that respondent was flying the aircraft at the time; and third, that another flight in respondent's aircraft had occurred before respondent arrived at the airfield. It is the Administrator's obligation, if he is to succeed, to prove his theory of the case by a preponderance of the evidence. Despite the fact that the law judge was no more than speculating when he suggested that someone else may have

(...continued)

P.M., and that she called her husband to come see it.

been operating the aircraft at the time and that the Flatens may have misidentified the aircraft, it remains that the law judge listened to and observed the testimony of six percipient witnesses to the effect that respondent was somewhere else at the time.

Although the Administrator in his appeal notes the law judge's finding that the Flatens' testimony was unrebutted, in the circumstances this finding is of no usefulness and does not compel the result the Administrator seeks. The law judge concluded that any inference that respondent was operating the aircraft that was raised by his ownership of the plane was rebutted by the eyewitnesses who testified on his behalf. The issue became one of credibility, and, although we might have assessed that issue differently, we cannot find the law judge's conclusion to be clearly erroneous. We are even less inclined to do so when he, and not this Board, has had the opportunity to observe the testimony. See Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there (resolution of credibility issues, unless made in an arbitrary or capricious manner, is within the exclusive province of the law judge).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The Administrator's order is dismissed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.